No. 12,247

IN THE

United States Court of Appeals

For the Ninth Circuit

FRED ELIA IOB, SAMUEL M. DOBBS, and WALDEMAR F. ULLRICH,
Petitioners and Appellants,
vs.
LOS ANGELES BREWING CO., INC. (a corporation), et al.,
Respondents and Appellees.

ANSWERING BRIEF OF ADDITIONAL RESPONDENTS AND APPELLEES.

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STATEMENT OF FACTS.

Insofar as the additional respondents are concerned, there never has been a trial. Insofar as the additional respondents are concerned, this cause was dismissed without ever going to trial.

During the month of January, 1947, an action was instituted by appellants against the Los Angeles Brewing Company, Inc. (Tr. 2-9.) In the month of February, 1947, the said brewing company filed its answer. (Tr. 9-41.)

On April 1, 1947, the said cause came on for trial and was tried on April 1 and 2, 1947. The Court made its decision and directed the preparation of findings. (Tr. 42-44.) Nine (9) witnesses testified at said trial and a stipulation was entered into with respect to the testimony of another witness. (Tr. 42-44.)

On May 19, 1947, petitioners, the appellants here, moved for a new trial and for leave to amend their petition and add additional respondents as parties. The motion was granted. (Tr. 45-47.)

Up to this point additional respondents had not been parties and had taken no part in any of the proceedings.

On or about May 28, 1947, an amended petition was filed and an order to show cause was issued. (Tr. 48-63.)

On June 5, 1947, the return day of said order to show cause, additional respondents appeared specially and moved to dismiss, vacate and set aside alias summons, amended petition for enforcement of veterans' employment rights, order to show cause and supported said motion with an affidavit and memorandum of points and authorities (Tr. 66-73) and oral testimony. (Tr. 359-367.)

On June 7, 1947, the said motions were denied. (Tr. 98.)

On June 10, 1947, additional respondents served and filed their answer (Tr. 99-123) to petitioners' amended petition. (Tr. 48, et seq.)

That thereafter, all further proceedings were, on September 3, 1947, suspended until November 4, 1947. (Tr. 170.)

That on December 8, 1948, said cause came on *"For resetting for trial or disposition"*. (Tr. 198; italics ours.)

That said cause as to said additional respondents has never been set for trial and, insofar as the additional respondents are concerned, never tried.

STATEMENT OF THE CASE.

Appellants state:

> "Error No. 1
>
> The District Court erred in ruling that the appellants' discharges were for cause within the meaning of Section 8 of the Selective Service and Training Act.
>
> Error No. 2.
>
> The District Court erred in failing to order reemployment of appellants by Los Angeles Brewing Company and in failing to assess damages against respondents for loss of wages of appellants."
>
> (App. Br. pp. 8-9.)

and argue:

> "Thus the acts of the Teamsters' Unions in wrongfully bringing about the discharge of the appellants in this case, are tortious and the appel-

> lants are entitled to a judgment for damages against these unions."
>
> (App. Br. p. 14.)

Appellants forget that as to the so-called "Teamsters' Unions", there has been no trial and they have not had their day in Court.

For this Court or any Court, on the record as it now stands, to render a judgment against the additional respondents would be unconstitutional, void and a truly monstrous violation of due process.

Certainly, the attempt by appellants to bind the additional respondents by the testimony of nine (9) witnesses (Tr. 42-44 and 240-359) all heard before additional respondents were made parties, and none of whom additional respondents had an opportunity to cross-examine, must fail.

Certainly, these additional respondents cannot be bound by a stipulation as to the testimony of one, Dobbs, made by the attorneys of petitioner and respondent at a time when additional respondents were not even parties. (Tr. 42-43.)

In view of the Court's announced intention so to bind additional respondents and in view of the Court's refusal to permit additional respondents to cross-examine said witnesses (Tr. 368-375) additional respondents included in their answer the following:

> "Third Defense.
>
> "The joinder of the additional respondents at this stage of the proceedings and upon the terms

laid down by the Court as to each said additional respondent is a denial of due process and a violation of the Fifth Amendment to the Constitution of the United States."

(Tr. 100.)

That whatever action the District Court decided to take in the above entitled matter, insofar as additional respondents are concerned, could only have been based upon the hearing on the order to show cause issued May 28, 1947 (Tr. 61-63) and heard June 5, 1947 (Tr. 63-65) and June 7, 1947 (Tr. 96-98) at which time the Court granted additional respondents leave to file:

"* * * answering affidavits in support of respondent unions re Order to Show Cause, at which time the Court will issue injunction in accordance with its finding that the petitioners were unlawfully discharged and are entitled to their positions (unless said affidavits remove conclusion which Court has arrived at) upon application therefor by petitioners."

(Tr. 98.)

That additional respondents complied and on June 10, 1947, served and filed its verified answer. (Tr. 99-123.) Apparently, the additional affidavits and the answer of additional respondents removed the conclusions which the Court had arrived at and substituted others, resulting in the dismissal.

ARGUMENT.

The Fifth Amendment to the Constitution of the United States says:

"* * * no person shall * * * be deprived of life, liberty or property without due process of law."

"In its procedural aspect the constitutional guaranty of due process of law assures to every person his day in court."

16 *C. J. S.*, p. 1153;

Truax v. Corrigan, 42 S. Ct. 124, 257 U.S. 312, 66 L. Ed. 254.

"Its essential elements are notice and opportunity to be heard or defend."

16 *C. J. S.*, pp. 1153-1154;

Ownbey v. Morgan, 41 S. Ct. 433, 256 U. S. 94, 65 L. Ed. 837;

Postal Telegraph Cable Co. v. City of Newport, 38 S. Ct. 566, 247 U. S. 464, 62 L. Ed. 1215.

"The right to a fair and adequate hearing in which one has the right to defend his interests before an impartial court is essential to due process of law."

16 *C. J. S.*, p. 1265.

"* * * Due process has been held to include the right to counsel. * * *"

16 *C. J. S.*, p. 1267.

"A party has a right to cross-examine witnesses who have testified for the adverse party, and this right is absolute and not a mere privilege, and, unless subject to cross-examination, a witness cannot testify, and it is not within the discretion of

the court to say whether or not the right will be accorded; further, it has been held that this right is embraced in the constitutional right to counsel for defense."

70 *C. J.*, pp. 611-612;

Alford v. U. S., 51 S. Ct. 218, 282 U. S. 687, 75 L. Ed. 624.

It follows, we submit, from the foregoing that at no time could the trial Court have entered any judgment against the additional respondents for damages, nor could the trial Court have granted a permanent injunction against additional respondents.

At most, the trial Court might have granted an injunction *pendente lite* against the additional respondents from which respondents would have appealed by reason of the Court's violation of due process in that in considering petitioner's application for an injunction *pendente lite,* the trial Court announced that it would:

(a) consider all the testimony previously offered, and

(b) would not direct or order the recall of said witnesses for cross-examination (Tr. 368-375)

to all of which additional respondents objected.

However, the trial Court did not issue any injunction *pendente lite,* but instead upon application of the appellants' counsel for "final action" dismissed the proceeding.

CONCLUSION.

Additional respondents respectfully submit that as to them no judgment may be entered against them by this Court or by the District Court in the absence of a trial.

However, additional respondents respectfully submit that the decision of the District Court was not erroneous and that the facts, issues and the law applicable thereto have been eroneously stated in the opening brief of appellants and therefore respectfully ask leave of the Court for thirty (30) days from and after the filing of respondents' answering brief within which to file an amicus curiae brief in support of respondents with respect to the alleged Errors Nos. 1 and 2 set out in appellant's brief.

Dated, San Francisco, California,
January 25, 1950.

Respectfully submitted,
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